

OCT 25 2007*Holter v. City of Pasadena*, No. 06-55143**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

TASHIMA, Circuit Judge, dissenting:

Because this is an appeal from the grant of summary judgment to defendants, we must construe the record in the light most favorable to plaintiffs. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). Read in that light, the record discloses an issue of material fact which bars the grant of qualified immunity.

When Officer Derrick Carter opened the door separating him and plaintiffs' decedent, Robert Ryan Holter, Holter was in a crouching position near the door. As the door opened, Holter fell out through the doorway, either because he was leaning against the door or simply because he lost his balance. Holter did not scream nor did he do anything to indicate that he might attack Officer Carter. He simply fell forward into the doorway as the door was opened. As Holter fell, Carter fired two shots and killed Holter. The forensic evidence revealed that one bullet entered Holter's chest in a downward trajectory and the second entered his lip, consistent with Holter being shot while falling. Given these facts, which we must accept as true at this stage of the case, I cannot agree with the majority's conclusion that "Officer Carter's actions were reasonable under the circumstances, and therefore did not constitute unreasonable use of force in violation of the Fourth

Amendment.”

These facts do not objectively amount to reasonable cause to believe that the suspect was initiating an attack or otherwise justify the use of deadly force. Thus, I conclude that Holter’s Fourth Amendment rights were violated. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (“Specifically with regard to deadly force, we explained in [*Tennessee v.] Garner* [471 U.S. 1 (1985)] that it is unreasonable for an officer to ‘seize an unarmed, nondangerous suspect by shooting him dead.’”). Because Holter’s clearly established Fourth Amendment right not to be subjected to deadly force was violated, I would reverse the grant of summary judgment on qualified immunity grounds and remand for trial.

I respectfully dissent.